

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**RHODE ISLAND PBS FOUNDATION,**

**and**

**Case 01-CA-204520**

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS, LOCAL 1228.**

*Elizabeth A. Vorro Esq. (NLRB Region 1)*  
of Boston, Massachusetts, for the General Counsel

*Matthew H. Parker, Esq. and Joseph D. Whelan (Whelan, Corrente,  
Flanders, Kinder & Siket, LLP)*  
of Providence, Rhode Island, for the Respondent

**DECISION**

**INTRODUCTION**

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves an employer that operates a public broadcasting television station in Providence, Rhode Island. For many years, the station's engineers and technicians have been represented for purposes of collective bargaining by a union. The government alleges that beginning May 11, 2017, the employer unlawfully refused to meet to bargain with the union, subsequently withdrew recognition from the union as the employees' representative, refused the union's request for information related to the unit, and instituted unilateral pay changes for certain employees, all in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (Act). The employer essentially admits the conduct, but contends, contrary to the government, that it was lawful to do so based upon its contention that a majority of the unit employees told the employer that they rejected union representation. In addition, the government seeks to amend its complaint to allege that the employer's method of attempting to assay employee support for the union, as explained by the employer's witnesses at the hearing, violated Section 8(a)(1) of the Act. As set forth herein, the employer's defenses on all these claims are meritless, for multiple independent reasons. I find that the employer violated the Act, as alleged.

**STATEMENT OF THE CASE**

On August 15, 2017, the International Brotherhood of Electrical Workers, Local 1228 (Union) filed an unfair labor practice charge alleging violations of the Act by the Rhode Island PBS Foundation (Foundation), docketed by Region 1 of the National Labor Relations Board (Board) as Case 01-CA-204520. The charge was amended by the Union on November 1, and a second time on November 30, 2017.

Based on an investigation into this case, on November 30, 2017, the Board's General Counsel, by the Regional Director for Region 1 of the Board, issued a complaint and notice of hearing alleging that the Foundation had violated the Act. On April 6, 2018, through the Acting Regional Director, the General Counsel issued an amended complaint and notice of hearing. The Foundation filed an answer to both the complaint and the amended complaint denying all alleged violations of the Act.

A trial in this case was conducted on April 24-25, 2018, in Providence, Rhode Island, at which time the General Counsel sought and was granted further amendments to the amended complaint. Another motion to further amend the complaint was filed by the General Counsel on or about May 7, 2018, which is pending, and opposed by the Respondent.

Counsel for the General Counsel and the Respondent filed posttrial briefs in support of their positions by June 27, 2018.

On the entire record, I make the following findings, conclusions of law, and recommendations.

### **JURISDICTION**

At all material times, the Foundation has been a private, non-profit Rhode Island corporation with an office and place of business located at 50 Park Lane, Providence, Rhode Island, and has been engaged in the business of operating a public broadcasting television station in Providence, Rhode Island. Annually, the Foundation, in conducting its business operations, derives gross revenues in excess of \$100,000, and operates under a license and permit of the Federal Communications Commission. Annually, the Foundation, in conducting its business operations, as described, purchases and receives at its Providence, Rhode Island facility goods valued in excess of \$5,000 directly from points outside the State of Rhode Island. At all material times, the Foundation has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

### **UNFAIR LABOR PRACTICES**

#### ***A. Introduction***

The Foundation operates a public television broadcasting station in Providence, Rhode Island. David Piccerelli is the Foundation's president. In that capacity he is the chief operating officer of the Rhode Island PBS television station, WSBE-TV. Piccerelli reports to the Foundation's Board of Directors.

Before October 2012, the television station was operated by a public entity known as the Rhode Island Public Telecommunications Authority (RIPTA). Around October 12 or 14, 2012, the station's broadcast license was transferred from RIPTA to the Foundation, which assumed ownership of and operating responsibility for the station. Previously, the Foundation existed as the fundraising arm for the television station. When the Foundation assumed control of the station it offered the station's employees employment with the Foundation and a majority accepted the offer and remained working at the station. In approximately December 2012, the

Foundation made unilateral changes to employees' health insurance, pension benefits, and wages.

When RIPTA operated the station, the technicians and engineers had been represented by the Union, at least as far back as the early 1980s. In November 2012, after the Foundation assumed operation of the station, the Union requested that the Foundation recognize it and also filed a representation petition with the Board. On February 8, 2013, the Foundation agreed to recognize the Union as the employees' collective-bargaining representative and requested dates for bargaining. The parties stipulated at the hearing that the recognized unit consists of:

All full-time and regular part-time Maintenance Engineers, Television/Broadcast/Watch Engineers and Telecommunications/Television Technicians employed by the Employer, but excluding all other employees, guards, and supervisors as defined in the Act.

From late 2013 until May 23, 2017, there were six employees in the bargaining unit. On May 23, 2017, Patrick O'Brien became the seventh unit employee, and in September 2017, the hire of Timothy Smith brought the unit complement to eight. Unit employee Michael Riley left the unit to become a producer director, in October 2017. In February 2018, three additional employees were hired, bringing the number of unit employees to ten, which remained the case as of the time of the hearing in April 2018.

#### **B. 2013–2016**

The parties began bargaining for a collective-bargaining agreement in 2013. They met infrequently, conducting about five bargaining sessions from 2013 through 2015. Some tentative agreements were reached. The Union did not file any grievances under the terms of the expired contract from 2011 to 2016.

In approximately May 2015, Union Representative Fletcher Fischer informed Piccerelli and the Foundation's attorney, Joseph Whelan that the Union was going to seek membership ratification of the Foundation's latest contract offer. In conjunction with this, Fischer asked the Foundation's attorney for a finished "clean" document to show the membership. On June 25, Fischer sent an email to Piccerelli and Whelan stating:

We are voting on the Contract offer today yet we still have no draft document to work with. We are working with a markup and our notes so the vote will be based on those, would really appreciate the draft that you said you were going to prepare.

Finally we asked for a census of the bargaining unit which we have yet to receive so far. Please forward both documents ASAP.

In a July 6, 2015 email, Fischer reported to Piccerelli that the members of the unit had ratified the proposal on June 25. Fischer's email indicated that he would "be sending . . . Checkoff forms for them in a separate email and the deductions will be retroactive back to the effective date of the Agreement of January 1, 2015. The deduction instructions will accompany that email." Fischer added that he wanted to meet to discuss "a few issues that came up in that ratification meeting," including the Union's view that "Nick" Moraites, "Mark" Smith, and "Joe" Brathwaite were regularly performing engineering duties but were "not being fairly compensated." Piccerelli responded the next day, July 7, suggesting dates and times for a meeting.

This meeting did not occur. In December 2015, Whelan sent a draft of the collective-bargaining agreement to Fischer but Fischer never followed up by asking Whelan to sign the agreement. Fischer never sent dues checkoff forms to the Employer and never asked employees to sign checkoff forms, which Fischer attributed to the Union's policy of not collecting dues until the employees were working under a signed contract—something that, despite the ratification, never materialized.

In 2016, the Union attempted to schedule a couple of labor-management relations meetings but they did not occur, although an August 2016 email from Piccerelli to the Union suggests that the Foundation was amenable to meeting. In May 2016, Shop Steward Andrew Gannon complained in an email to Director of Engineering Richard Dunn about Dunn's practice of texting unit employees on their personal cell phones during working and nonworking hours. Gannon told Dunn that "All IBEW members are requesting . . . that you cease texting them on their personal cell phones." Dunn rejected this, responding that "I think you have exceeded the scope of your representation. I don't believe you speak for the shop on this issue." Dunn testified that at the time Gannon brought this up to him in the email he was aware that the employees were union-represented.

### C. 2017

In April 2017, the Foundation participated in an auction of its broadcast frequency. This meant, effectively, that the Foundation sold its space at channel 21 and received in exchange broadcast space at channel 2. For participating in this auction and making the switch, the Foundation was paid over \$94 million.

In March 2017, Fischer contacted Piccerelli by phone and discussed negotiating a new agreement with pay increases based on the anticipated influx of funds from the auction. Piccerelli told Fischer to provide him with a proposal.

The union's shop steward, unit employee Gannon, put together a wage proposal. It was submitted on May 11, by Fischer, who emailed a proposed collective-bargaining agreement to Piccerelli with the new wage demands. Later that morning, Piccerelli responded, writing "We will review and be back to you with comments."

On May 30, having yet to hear from Piccerelli, Fischer wrote, asking, "Any thoughts on our proposal yet?"

On June 19, apparently in response to a voicemail message from Fischer, Piccerelli wrote,

I have received your voicemail. I have not been able to connect with [Employer's attorney] Joe [Whelan] as of yet and he is now on vacation this week. I left him another message so as soon as I hear back from him I will be back to you.

On July 13, Fletcher wrote Piccerelli, "It[']s been close to a month since you said you would get back to me. This is getting more than a little tiresome." Piccerelli responded that, "I am scheduled to speak with my attorney tomorrow morning. I will be in touch shortly."

On July 24, Fischer wrote back to Piccerelli, "do you have an answer yet? It's been 11 days since you were supposed to meet with him." Piccerelli responded the same day, "No. [W]e have not been able to schedule something yet." Fischer never heard from Piccerelli.

5 Meanwhile, while Fischer was seeking to bargain with the Foundation for higher employee wages, the Foundation unilaterally provided wage increases to six of the then seven bargaining unit employees in July 2017.<sup>1</sup> The Union was not notified of these wage increases before they were unilaterally provided to employees by the Foundation. Piccerelli testified that he first proposed the wage increases to the Foundation's Board of Directors around the third week of May 2017, as part of the initial budget proposal.

On August 15, 2017, the Union filed the first unfair labor practice charge in the instant case, alleging that the Foundation had failed and refused to bargain in good faith.

10 On October 19, 2017, the Foundation asserted in writing that it was withdrawing recognition from the Union.<sup>2</sup>

On October 31, 2017, Fischer sent a letter to Piccerelli, stating:

15 The Union is making a formal demand to bargain on behalf of the Technicians bargaining Unit at Rhode Island PBS Foundation. We are available to meet any day the week of November 18. If you are not available that week, please let us know what dates you are available.

Fischer's October 31, 2017 letter also included a detailed information request, each item of which was a request for information concerning the unit employees, their terms and conditions of employment, or the performance of bargaining unit work. The Union's letter requested the following information:

- 20
1. Name, address, classification, base rate of pay, date of hire of each Bargaining Unit Employee.
  2. Overtime earned (in hours and dollars) for each Bargaining Unit Employee in the past 12 months.
  - 25 3. A list of any and all pay increases granted to each Bargaining Unit member over the last 3 years.
  - 30 4. Copies of current job descriptions for all Bargaining Unit positions.

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<sup>1</sup>One employee, Patrick O'Brien, newly hired in May 2017, did not receive the wage increase.

<sup>2</sup>The Foundation admits that it withdrew recognition from the Union (GC Exh. 1(m) at ¶14, see also R. Br. at 12). However, it never clearly states when it did so, instead framing its arguments in terms of its alleged right to withdraw recognition. As referenced above, as of July 2017, Piccerelli was still responding to Fletcher's bargaining requests with promises that the Foundation would get in touch with the Union shortly. The only direct record evidence on the issue of withdrawal of recognition is the parties' stipulation that the first time the Foundation asserted in writing that it was withdrawing recognition from the Union was October 19, 2017. Given the Foundation's admission, and the evidence, I find that the Respondent withdrew recognition on or about October 19, 2017. I note that, given my analysis, *infra*, the precise date of the withdrawal of recognition matters only for fixing the date of that violation. In terms of the validity of the Respondent's defenses, the precise date of the admitted withdrawal of recognition is irrelevant.

5. Copies of all plan documents /financial and other reports covering plans for health insurance, life insurance, sick leave, short and long term disability for all bargaining Unit Employees.
- 5 6. List of Employees enrolled in each benefit plan.
7. A copy of any and all Company policies that relate to Bargaining Unit Employees.
- 10 8. Any and all instances of bargaining unit work performed by non-unit persons in the past 12 months.

Fischer did not receive a response to this letter.

Effective December 31, 2017, the Foundation granted additional salary increases to two of the bargaining unit employees, Nick Moraites and Mark Smith. The Union was not notified of or provided an opportunity to bargain over these wage increases.

#### ***D. Interrogation of employees' union sympathies***

##### **Piccerelli**

As discussed above, in March 2017, Union Representative Fischer contacted Piccerelli to discuss negotiating pay increases for employees in light of the influx of funds expected from the auction. Piccerelli told Fischer to provide him with a proposal, which he did on May 11.

Within a couple of weeks of receiving the Union's May 11 bargaining proposal, Piccerelli made an effort to find out what a majority of the then seven-person unit felt about the Union.

Piccerelli spoke with employee Mark Smith in Piccerelli's office for five or ten minutes. Smith had come to Piccerelli's office on his own without being asked to come. The subject of the conversation was Smith's desire to be—and belief that he was not being—"fairly compensated." Piccerelli testified that although he could not remember Smith's exact words, "I can say that he was not pleased with the representation that he was getting from the Union in terms of his compensation." Although Piccerelli could not "recall his exact words," Smith's "message was that he did not feel that the Union was providing him adequate representation towards compensation."

Piccerelli testified that Smith brought up the Union. Smith said that "he did not feel like he was being fairly represented by the Union." According to Piccerelli, Smith was "not very specific," but just expressed "general displeasure." According to Piccerelli, Smith "[d]idn't feel that he needed them to represent him, felt that, you know, doing his work would merit whatever increases that he deserves."

In this meeting, according to Piccerelli, "I specifically asked Mr. Smith if any other bargaining unit employees felt the way he did about the bargaining unit." Smith responded that Sousa and "Brathwaite both felt the same way that he did in terms of the representation that they were getting from the Union."<sup>3</sup>

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<sup>3</sup>Smith testified but did not recall this conversation, but stated that he has had other conversations in years past with Piccerelli about the Union and his frustration with his wages.

Piccerelli testified that he “didn’t think it was fair for me to rely on information that was coming from Mr. Smith,” so after this meeting with Smith, within a couple of days, Piccerelli called Brathwaite into his office “so I could hear Mr. Brathwaite’s feelings and opinions for himself and not second hand from Mr. Smith.” Piccerelli paged Brathwaite to come into his office using a  
 5 paging system that can be heard by everyone in the shop. (Piccerelli joked that “I think the neighbors can hear it too when the garage door’s open.”)<sup>4</sup>

Once Brathwaite was in Piccerelli’s office, Piccerelli testified that “I specifically asked him how he felt about the representation he had from the Union. . . . And if he wanted to continue forward having representation of the Union.” Braithwaite testified that Piccerelli’s exact words  
 10 were “What did I think about the Union?”

According to Piccerelli, Brathwaite told him that “he didn’t feel it was necessary to have representation from the Union.” According to Piccerelli, Brathwaite “reiterated basically what Mr. Smith said and that he did not feel that they were being fairly represented in terms of their  
 15 compensation and other benefits from the Union.” Brathwaite testified that Piccerelli asked him “what did I think about the Union.” He answered. “No.” Brathwaite further testified that in response to Piccerelli’s question about what he thought of the Union, he answered, “I’m not interested in it and that was that.

In this meeting, Piccerelli did not tell Braithwaite that he did not have to speak about how he felt about the Union, or that the discussion was voluntary, or that he did not have to answer  
 20 the questions. Piccerelli did not tell him that whatever his answers, they would not have any effect on his work, or that nothing would happen to him whether or not he supported the Union.

Piccerelli also summoned employee Patrick O’Brien to his office within a week or two after O’Brien became a unit employee on May 23, 2017 (O’Brien had worked part-time for five or six years in a different role).

25 According to Piccerelli, “I had invited him in as a new employee to go—to see, you know, what his interest was in having representation by the Union.” Piccerelli asked O’Brien if he wanted to be represented by the Union. According to Piccerelli, O’Brien gave him “kind of a wishy-washy answer.” O’Brien told Piccerelli something to the effect that he did not feel “that he needed to have Union representation, but he also felt that he didn’t want to go against the friends

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Piccerelli also testified that he had spoken to Smith “two or three other times over the years,” specifically recalling once, “probably sometime May of ’16 or earlier . . . definitely more than a year” or “almost a year” prior to the June 2017 conversation with Smith, when Smith was in tears and said that “he was looking for more money and that the Union was not doing anything to get him more money.” Smith recalled this conversation, but was sure it occurred “three years ago,” i.e., in 2015, where “with tears in my eyes,” he talked to Piccerelli about his frustration with wages and how he could not afford the Union, but Piccerelli told him that his “hands were tied” because of the Union. More generally, Smith testified that he had several conversations over the years with Piccerelli where he “consistently” told Piccerelli that “I didn’t feel a representation from the Union and I let it be known.”

<sup>4</sup>In his direct testimony Brathwaite tentatively agreed that he was called into Piccerelli’s office (“Yes, I think so”) but on cross examination denied it. I credit his direct testimony which was in accord with Piccerelli’s certain recollection that Piccerelli initiated the conversation by calling Brathwaite into his office through the paging system in an effort to follow-up on Smith’s identification of Brathwaite as someone who shared Smith’s views.

that he had at the station if that [union representation] was something that they wanted. And that he would, you know, think about it going forward.” Piccerelli testified that O’Brien “told me he was against it, but he did not specifically say that, you know, he would necessarily—how he would vote.” O’Brien asked and expressed concern about whether there would be an “open vote” on the Union, as “he didn’t want to be perceived as going against anybody, specifically those in favor of the Union.” Piccerelli could not give O’Brien a specific answer because, as he testified, “I was not certain as to whether or not it was a public vote or a private vote or how it’s conducted.” Piccerelli did not tell O’Brien that his discussion with Piccerelli about the Union was voluntary or that nothing would happen to him no matter what O’Brien said.<sup>5</sup>

10 Piccerelli also testified that he told Director of Engineering Rick Dunn about Smith’s comments. Dunn is Smith’s, and the other unit employees’ direct supervisor in the engineering department. Piccerelli asked Dunn to check with a fourth employee, Joao (Jon) Sousa, “to see what his feelings were on having representation by the Union.” Dunn told him he would. Piccerelli testified that when he followed-up with Dunn, Dunn told him that Sousa “was not  
15 interested in having representation by the Union.” Piccerelli testified that unlike the conversations he had with Smith, Brathwaite and O’Brien, he did not personally have an “official” meeting with Sousa to discuss his views on union representation.<sup>6</sup>

### Dunn

20 Dunn testified that in a conversation with Smith and Brathwaite in the station’s studio they conveyed to him that they did not feel represented by the Union. O’Brien allegedly told him the same thing. Dunn testified that he worked closely with and talked regularly with Sousa who allegedly told him this. As noted, I do not credit this. See fn. 6, supra.

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<sup>5</sup>O’Brien did not testify.

<sup>6</sup>Director of Engineering Dunn testified that he did not recall Piccerelli asking him to speak to Sousa, but I credit Piccerelli’s account, which was credibly offered. More generally, I found Piccerelli a credible witness, who appeared to testify frankly and honestly. Director of Engineering Dunn, who testified that he was an attorney and member of the Rhode Island and “Federal” bar, emphasized throughout his testimony that “members of the unit do not feel that they’re represented by a Union.” Dunn claimed that he told Piccerelli this when Piccerelli called him into his office in May 2017, and told him he had received a wage proposal from the Union and “wanted to speak to [Dunn] about the bargaining unit.” Dunn testified that he told Piccerelli that employees Smith, Brathwaite, Sousa and O’Brien “didn’t feel that there was a union” and that “there is no Union.” Dunn claimed that Smith, Braithwaite, and Sousa told him this. However, not a single witness corroborated this odd formula—not Piccerelli, not Smith, not Braithwaite, not Sousa. Further, it is implausible that O’Brien would tell Dunn this even before he became a union-represented employee on May 23. I discredit Dunn. The closest to this is Brathwaite’s testimony that he told Piccerelli—not Dunn—that “I don’t feel a representation from the Union.” I believe Dunn repeated this odd phrasing about there “being no union” and employees feeling they were not represented by a union throughout his testimony in service to the Respondent’s legal theory that its refusal to bargain was justified by a claimed union abandonment of the unit, a theory not supported by the facts even if his testimony was credited, which it is not. I decline the Respondent’s invitation (R. Br. at 9) to credit Dunn based on the fact that he is “a licensed attorney and therefore duty bound to be candid and honest.”

Dunn described a conversation with Smith and Brathwaite in April or May of 2017, in the station's studio where he encountered them and they complained to him that they had been discouraged by Union Steward Gannon from moving staging equipment. Dunn asserted that Smith "said to me that you don't represent me, you don't tell me what to do. I just want to help  
 5 get this done so I can move on with what we have to do."<sup>7</sup> Dunn asserted that Brathwaite "expressed the same sentiment," and like Smith, recapitulated the conversation he had with Gannon for Dunn. He also claimed that Brathwaite told him that "they [the Union] have their own agenda, they never asked me who I wanted for shop steward." Dunn claimed that Brathwaite told him in this conversation, "there is no Union." Dunn says he told Brathwaite to "speak to [shop  
 10 steward] Andy Gannon about that."<sup>8</sup>

Dunn claimed that this was not the first time he had had such conversations with Smith: "Mr. Smith repeatedly complained about how they didn't represent him." He had "ongoing" conversations where Smith complained to Dunn about his wages and how the Union "they're not helping me," and "there is no Union." According to Dunn, "it was a narrative that Smith would  
 15 repeat over and over again periodically."<sup>9</sup>

Dunn claimed he relayed these conversations to Piccerelli when he met with him in May. He also testified that he told Piccerelli at this meeting that Sousa "does not feel he's represented by the IBEW. He doesn't like the Union." Dunn claimed that "from 2016 on" Sousa "would often say that they don't represent me" and that "there's no Union, there's no contract."<sup>10</sup>

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<sup>7</sup>Although this testimony of Dunn's was phrased as if Smith was telling Dunn that Dunn did not represent him and doesn't tell Smith what to do, that was not what Dunn meant to convey. Rather, he meant to convey in his testimony that Smith said this about Gannon. I believe the confused way Dunn presented this testimony was attributable to the rehearsed and rote manner in which it was offered by him.

<sup>8</sup>Braithwaite testified that he had many conversations with Dunn about the Union over the years. Braithwaite confirmed that he told Dunn about the incident with Shop Steward Gannon, and told Dunn, "this is why I can't be in the Union because I do so many things at the Company that I can't have my hands tied."

<sup>9</sup>Smith testified that he had spoken to Dunn about the Union "many time," perhaps "100 times" in the past two years about the Union and his interest in representation. Smith said that in the past two years he talked with Dunn about "My interest was not being represented by the Union. I was displeased as to what was going on. And that was my conversation with him." Smith testified that he told Dunn that "financially is the reason why I didn't [want] the Union to represent me." Smith could not say when these conversations occurred, "We work together every day" but that "all of my conversations were basically the same. I couldn't afford it."

<sup>10</sup>Sousa testified that he has talked with Dunn about the Union "several times a week for the past couple of years." According to Sousa, "My main thing is and I always brought it up, and unfortunately I was a broken record, where like I said I wasn't—the times of being notified of what was going on, that I didn't vote for the person that was elected as the shop steward." Sousa also complained to Dunn that he "didn't see any emails of what was going on" for over a year and a half. Sousa testified that he talked to Dunn about other things but "I cannot remember at this moment." Those were the only things he could remember. Sousa also testified credibly that Dunn never asked him how he felt about the Union (Tr. 185).

Dunn also testified that he told Piccerelli that Obrien “told me he wasn’t interested in the Union, he thought that they promoted people on longevity and not on merit.” Dunn claimed that O’Brien told him this “in the tech center,” after he became a full-time employee in May 2017.

5 In sum, I do not credit Dunn’s testimony to the extent he claimed that he was told by employees that (or some variant of) “they are not represented,” or “there is no union.” See also fn. 6, *supra*.

### Analysis

10 The General Counsel alleges four violations of Section 8(a)(5) of the Act: (1) that from on or about May 11, 2107, and on subsequent dates, the Respondent unlawfully failed and refused to meet with the Union for the purposes of negotiating a collective-bargaining agreement to cover the unit employees; (2) that on or about October 19, 2017, the Respondent unlawfully withdrew recognition from the Union as the collective-bargaining representative of the unit; (3) that since on or about October 31 2017, the Respondent has failed and refused to provide the Union requested and relevant information; (4) and that on or about December 31, 2017, the Respondent  
15 unilaterally changed the wage rate of employees Smith and Moraites without providing the Union notice or an opportunity to bargain.

20 Finally, the General Counsel moved posttrial, and over the opposition of the Respondent, to amend the complaint to allege that Piccerelli’s interrogation of Braithwaite and O’Brien regarding their union sympathies, and Dunn’s interrogation of Sousa, constituted independent violations of Section 8(a)(1) of the Act.

25 I will consider the alleged violations, and the motion to amend, below.

The alleged bargaining violations stem directly from the fact that at all times after February 2013, when the Foundation recognized the Union as the unit employees’ collective-bargaining representative, the Respondent remained legally obligated to bargain with the Union, provide relevant and requested information, recognize the Union as the collective-bargaining  
30 representative, and maintain the status quo in terms and conditions of employment unless and until it reached a good-faith bargaining impasse.

35 The Union was the recognized collective-bargaining representative of the Foundation’s unit employees as of February 8, 2013. Unless something happened to divest the Union of this representational status thereafter, the Respondent’s refusal to meet to bargain upon request beginning May 11, 2017, its assertion on October 19, 2017 that it was withdrawing recognition from the Union, its refusal to provide information in response to the October 31, 2017 information request, and its December 31, 2017, unilateral implementation of wage changes, each constitute fundamental violations of the Section 8(a)(5) duty to bargain.<sup>11</sup> In addition, as alleged, each of

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<sup>11</sup>See, e.g., *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (“A refusal to negotiate in fact as to any [mandatory] subject . . . about which the union seeks to negotiate, violates section 8(a)(5)”; *J. H. Allison & Co.*, 70 NLRB 377, 378 (1946) (employer violates the Act by refusing to engage in bargaining over a mandatory subject as to which the union requests bargaining), *enfd.* 165 F.2d 766 (6th Cir. 1948); *CoServ Electric*, 366 NLRB No. 103, slip op. at 2–3 (2018) (unilateral withdrawal of recognition from union is Sec. 8(a)(5) violation); *Badlands Golf Course*, 355 NLRB 251 (2010) (withdrawal of recognition violates Section 8(a)(5)); *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011) (“An employer’s duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration.



and representation petition filed by the Union after the Respondent initially resisted recognizing the Union.

5 The Foundation's argument suggests that a successor seeking to unilaterally reject union recognition on behalf of its employees should be held to a lower standard than *Levitz*, and that this lower "good faith doubt" standard should remain in place for years (here, four) after the successor employer recognized the union. This is beyond meritless.

10 Putting aside that the Supreme Court has recognized that the rationale for the presumption of majority support is "particularly pertinent in the successorship situation" (*Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41 (1987)), and thus, any suggestion that the standard for overcoming the presumption should be lowered in a successorship situation is indefensible, successor status has come and gone for the Foundation. It took over the TV station in 2012 and recognized the Union in February 2013. It is, of course, far too late for the Respondent to argue  
15 that its 2013 recognition of the Union was illegitimate or mistaken.<sup>13</sup>

### The *Levitz* lack-of-majority-support defense

20 The Respondent also contends that even applying *Levitz*, its refusal to deal with or recognize the union was justified by its claim that the union did not have majority support within the unit. This argument is unavailing, for four independent reasons.

25 1. While "[a]n employer can generally withdraw recognition, where it can prove a loss of majority status . . . . [t]his doctrine is, however, limited 'to cases where an employer has committed no unfair labor practices tending to undermine employees' support for unions.'" *CoServ Electric*, 366 NLRB No. 103, slip op. at 10 (2018), quoting *Levitz*, 333 NLRB 717 fn. 1 (2001) (citation to *Levitz* omitted).

30 Significantly, the Board holds that "an unlawful refusal to recognize and bargain with an incumbent union will be presumed to taint any subsequent loss of support for the union, without any particularized demonstration of a causal relationship." *Lee Lumber and Building Material Corp.*, 322 NLRB 175, 177 (1996), affirmed in relevant part, 117 F.3d 1454 (D.C. Cir. 1997).

35 Here, the Respondent refusal to bargain began May 11, 2017, before the Respondent even claims to have amassed evidence of a lack of majority support for the Union in late May and early June. Beginning May 11, the Respondent evaded and then ignored the Union's repeated entreaties to bargain for five months before the Employer withdrew recognition on grounds of lack of majority support. Without more, the Union's alleged loss of majority support is presumptively

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<sup>13</sup>*Red Coats Inc.*, 328 NLRB 205, 206-207 (1999) (an employer may not defend against a refusal-to-bargain allegation on the basis that the original recognition of the union was unlawful, where that recognition occurred more than 6 months before the charges raising the issue had been filed); *Route 22 Toyota*, 337 NLRB 84, 85 (2001) ("The Board has held, in light of the Supreme Court's decision in *Local Lodge 1424 IAM (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960), that a respondent may not defend against a refusal-to-bargain allegation on the ground that the underlying original recognition of the union was unlawful, if it occurred more than 6 months before charges had been filed in the proceeding raising the issue"). Any such defense is barred by Section 10(b), which, as the Court explained in *Bryan*, was specifically intended by Congress to stabilize bargaining relationships" (citation omitted). The Respondent claims that a nonprecedential decision in *Merit House, LLC*, 08-CA-099622 (January 6, 2014) (2014, WL 65756), supports its claim. It does not, for the reasons I explained at trial. See, Tr. 111-113.

tainted and cannot be a basis for the Respondent's withdrawal of recognition. *Lee Lumber*, supra.<sup>14</sup>

5 In addition, it is notable that the employee complaints about the Union solicited by Piccerelli focused on the lack of wage hikes, the very subject the Union was seeking to bargain as Piccerelli went about soliciting the evidence on which he based the withdrawal of union recognition. Soliciting employees to engage in decertification activities has long been held to be "antithetical to good-faith bargaining" (*Haymarket Bookbinders, Inc.*, 183 NLRB 121, 121 (1970)) and a "per se violation of Section 8(a)(5) of the Act." *Alle Arcibo Corp.*, 264 NLRB 1267, 1274 10 (1982). As discussed below, the Respondent and Piccerelli skipped the step of unlawfully soliciting employees to decertify—they simply took it upon themselves to gauge employees' union sympathies and withdraw recognition from the Union on behalf of the employees. Still, Piccerelli's interrogation efforts were the basis for the Employer's withdrawal of recognition, and thus, just as would an unlawfully solicited decertification effort, add to the 8(a)(5) refusal to 15 bargain violation.

2. The second reason to reject the Respondent's claim that it was privileged to withdraw recognition from the Union is that interrogating employees about their union sympathies is not an option under *Levitz* for amassing evidence that a union lacks majority support.

20 The *Levitz* unilateral withdrawal doctrine applies when employers are *presented* with proof that a union lacks majority support. The doctrine may not be invoked where, as here, an employer unilaterally *seeks out and solicits* evidence of employees' lack of support for the union. See *Levitz*, 333 N.L.R.B. at 725 (considering as persuasive evidence the "unsolicited views of employees regarding representation matters").

25 As the Board recognized in *Levitz*, "the selection or rejection of union representation unavoidably requires some degree of effort and organization on the part of employees, regardless of the type of petition (including those that are simply presented to employers and are not filed with the Board." 331 NLRB at 727. There is "no reason to allow employers to make the employees' choice for them by withdrawing recognition from majority unions." *Id.*

30 Here, there was *no* employee effort remove the Union as representative. There was not even a decertification campaign for the employer to unlawfully assist or unlawfully instigate, because there simply was no employee effort to remove the Union.<sup>15</sup>

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<sup>14</sup>No evidence rebuts the presumption. Nor could it, as the Respondent never resumed bargaining and the Board's presumption is rebuttable

only by an employer's showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining. Only such a showing of bargaining for a reasonable time will rebut the presumption.

*Lee Lumber*, 322 NLRB at 178; see also *Lee Lumber*, 117 F.3d at 1458.

<sup>15</sup>I note that the fact that a decertification petition appears to have been initiated nearly a year later in April 2018 (Tr. 210–211), just before trial of these cases, is irrelevant to consideration of the Respondent's 2017 withdrawal of recognition. *Anderson Lumber Co.*, 360 NLRB 538, 544 (2014) ("In any event, this evidence was acquired long after withdrawal of recognition, was not relied on by Respondent in withdrawing recognition, and is not relevant for that reason"); *enfd.*

Here, the employer ferretted out employee dissatisfaction, through interrogation, found what it considered (wrongly) to be enough, and on that basis unilaterally withdrew recognition. The employees did not seek to remove their Union. The Respondent did. An employer's unilateral withdrawal of recognition must be based on an employee effort to reject unionization that proves lack of majority support, not based on an employer's unilateral decision that it would be in the employees' interest to reject the Union.<sup>16</sup>

Under *Levitz*, and, assuming arguendo that the employer had a good-faith doubt about the union's support, it could have filed an election (RM) petition with the Board. It did not. It is not free to withdraw recognition based on evidence of employee lack of support for the Union purportedly uncovered by its own investigation into employee sympathies.

3. Third, and quite apart from the foregoing, the Respondent's questioning of employees about their union sympathies (and with Smith, of the union sympathies of others) under the circumstances presented was patently unlawful. This provides an independent basis why the evidence cannot be relied upon to prove lack of majority support.

Of course, not every interrogation is unlawful. Whether the questioning constitutes an unlawful coercive interrogation must be considered under all the circumstances and there are no particular factors "to be mechanically applied in each case." *Rossmore House*, 269 NLRB 1176, 1178 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Services, Inc.*, 331 NLRB 1226, 1227-1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001).

However, in general it is unlawful for an employer to inquire as to the union sentiments of employees. *President Riverboard Casinos of Missouri*, 329 NLRB 77 (1999). As the Board has explained, "In our view any attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his Section 7 rights." *Struksnes Construction Co.*, 165 NLRB 1062, 1062 (1967).<sup>17</sup>

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801 F.3d 321, 333-334 (D.C. Cir. 2015); *Pacific Beach Hotel*, 356 NLRB 1397, 1398 fn. 9 (2011), enfd. 693 F.3d 1051 (9th Cir. 2012).

<sup>16</sup>This case is a textbook reason why (*Levitz*, supra at 724 fn. 45):

Employers' invocation of employee free choices as a rationale for withdrawing recognition has, with good reason, met with skepticism. As the Supreme Court observed in *Auciello Iron Works v. NLRB*, [517 U.S. 781 (1996),] "The Board is accordingly entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one. There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom." 517 U.S. at 790. See also *NLRB v. Cornerstone Builders, Inc.*, 963 F.2d at 1078 ("unilateral withdrawal is based on the subjective belief of an inherently biased party").

<sup>17</sup>In a sense, what the Respondent did here was to conduct a poll, among a few employees, but it was a poll that lacked almost every procedural safeguard required by the Board. See, *Struksnes Construction Co.*, 165 NLRB 1062 (1967). The Respondent does not claim that it

In this case, considering all the circumstances, the unlawful nature of the questioning is not open to serious question. Here, the top official of the Respondent had what he described as “official” meetings, one-on-one, with three different employees in his office, outside of regular work routines, for the purpose of inquiring directly of them their views on union representation, and in Smith’s case, the views of other employees on unionization. None of the employees were open union supporters or activists. This was decidedly no casual questioning—Piccerelli wanted to know the employees’ union sympathies—he pointedly asked Smith, asked Dunn to find out about Sosa’s sympathies, and called O’Brien and Brathwaite into one-on-one meetings for the purpose of questioning them about their views on the Union. And two of three employees made clear that their concern was with obtaining higher wages, notable as Piccerelli’s questioning occurred at the same time that the Respondent was evading the Union’s entreaties to bargain for higher wages in light of the anticipated auction proceeds. Instead of honoring the duty to bargain, Piccerelli set out to quiz employees on their union sympathies and relied upon it in a misguided effort to free the Respondent from its duty to bargain. Finally, Piccerelli did not give the employees a legitimate reason for the inquiry or assure them that no reprisals would follow regardless of their answers. *NLRB v. Champion Laboratories*, 99 F.3d 223, 230 (7th Cir. 1996) (calling these clarifications “important considerations” in determining whether an interrogation about union sentiments is coercive). These interrogations do not pass muster under 8(a)(1).

While it is not necessary to find an independent violation of the Act in order for the illegitimate interrogation of employees to preclude a withdrawal of recognition based on the interrogations, it is appropriate to find such independent violations here. Notwithstanding 10(b)’s restrictions, “[i]t is well settled that the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.” *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990).

And that is particularly so where, as here, “the finding of a violation is established by testimonial admissions of the Respondent’s own witnesses.” *Id.* In this case, the interrogations of employees Smith, Brathwaite, and O’Brien, were raised at the trial by the Respondent. These interrogations formed its defense to the 8(a)(5) bargaining violations alleged by the General Counsel. The Respondent raised the interrogations as the grounds for justifying its withdrawal of recognition and refusal to bargain. The Respondent, on direct examination of its own witnesses, explained the process of these interrogations. There is no issue of due process as the Respondent independently, and purposely, raised the entire subject for its own purposes.

Thus, I find that the Respondent, through Piccerelli, violated Section 8(a)(1) of the Act by “specifically” asking Smith in or around late May 2017, “if any other bargaining unit employees felt the way he did about the bargaining unit,” by “specifically” asking Braithwaite in or around late May 2017, “how he felt about the representation he had from the Union . . . [a]nd if he wanted to continue forward having representation of the Union,” and by asking employee O’Brien into his office in late May or early June 2017, to gauge “what his interest was in having representation by the Union” which led to Piccerelli asking him if he wanted to be represented by the Union.<sup>18</sup>

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conducted a lawful poll of employees. To the extent Piccerelli’s questioning is considered polling, it is plainly an unlawful interrogation under *Strucknes*.

<sup>18</sup>I note that the General Counsel moved posthearing to amend the complaint to allege that Piccerelli unlawfully interrogated Brathwaite and O’Brien, and that Dunn unlawfully interrogated Sousa. The Respondent opposes the motion on two grounds: first, that the allegations the General Counsel seeks to add are “unsubstantiated,” in that the Respondent argues that the

Unlawful interrogations such as those conducted here necessarily cannot provide the basis for a withdrawal of recognition, as withdrawals of recognition must be based on “the free and uncoerced act of the employees concerned.” See *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985). Accordingly, I reject the Respondent’s withdrawal-of-recognition defense.

5           4. Fourth, the Employer’s withdrawal of recognition was illegitimate under *Levitz* because, apart from how it was procured, the evidence that the Respondent is relying on does not prove the Union’s lack of majority support.

10           Under *Levitz*, it is the employer’s burden to prove a loss of majority support by the preponderance of the evidence. *Levitz*, 333 NLRB at 725. “Thus, in order to rebut the continuing presumption of majority status, the employer bears the burden of showing, through objective evidence, an actual loss of the union’s majority status at the time of the withdrawal of recognition.” *Wurtland Nursing & Rehabilitation Center*, 351 NLRB 817, 817–819 (2007); *Levitz*, supra at 725. As the Board in *Levitz*, supra at 725, explained:

15           [A]n employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5).

25           Under *Levitz*, “In analyzing the adequacy of an employer’s defense to a withdrawal of recognition allegation, the Board will only examine factors actually ‘relied on’ by the employer. *RPT Co.*, 334 NLRB 466, 469 (2001), enfd. 315 F.3d 951 (8th Cir. 2003), quoting *Holiday Inn of Dayton*, 212 NLRB 553, 553 fn. 1 & 556 (1974). “Conduct of which the employer may have been aware, but on which the employer ‘did not base’ its decision to withdraw recognition from the

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evidence shows the interrogations were not coercive; and second, that the amendments are “futile” based on the claim that a petition for decertification was filed with the Board by employees as of April 20, 2018, and if the Board changes its blocking-charge policy the decertification petition “could very well render the whole [unfair labor practice] proceeding moot.” Objections of RI PBS Foundation to General Counsel’s Motion to Further Amend Complaint at 3.

Given my finding of violation in the text based on *Pergament*, supra, I deny the portions of the General Counsel’s motion to further amend relating to the interrogation of Brathwaite and O’Brien as moot. Absent the *Pergament*-based finding of violation, I would grant the motion to amend the complaint to plead the new allegations. And I would find a violation as to the interrogation of Brathwaite and O’Brien. The new allegations are closely related to the current litigation, are based on evidence that the Respondent advanced, and the motion was made more than 7 weeks before the parties filed posthearing briefs. I do not believe there would be any prejudice to the Respondent in the granting of the motion. At least as to interrogation of Brathwaite and O’Brien, for the reasons stated in the text, I reject the Respondent’s assertion that the allegations of unlawful interrogation are unsubstantiated. As to the Respondent’s futility argument, it is a non sequitur. A decertification petition, with or without a change in the Board’s blocking-charge rule, cannot render moot the unfair labor practice proceeding. I do, however, deny the General Counsel’s motion to amend the complaint to include the allegation that Dunn unlawfully interrogated Sousa. Based on my crediting of Sousa’s testimony that Dunn never asked him his views of the Union, the amendment is futile, and I deny it on those grounds.

Union, is of 'no legal significance.' *Id.*; *In Re Narricot Industries, L.P.*, 353 NLRB 775, 791 (2009) *Highlands Regional Medical Center*, 347 NLRB 1404, 1407 fn. 17 (2006) ("We need not address the sufficiency of the hearing testimony . . . because this evidence was not before the Respondent when it withdrew recognition"), *enfd.* 508 F.3d 28, 32 (D.C. Cir. 2007). See also  
 5 *Anderson Lumber Co.*, 360 NLRB at 544; *Pacific Beach Hotel*, 356 NLRB at 1398 fn. 9.

Under these standards, and quite apart from the illegitimacy of the Respondent's method of assaying employee support for the Union, the evidence relied upon by the Respondent does not prove that the Union did not have majority support.

10 The fact is, the Respondent is relying upon the frustrated, intermittent, and random complaints of employees about the quality of union representation, or the lack of necessity of a union, or negative encounters with a shop steward related to or solicited by management, for its claim that employees are rejecting union representation. Perhaps, although I do not decide, this  
 15 is the stuff of "good faith doubt" (albeit it not "good faith disbelief"<sup>19</sup>), but it is not proof of a lack of majority support.

20 The unilateral withdrawal of recognition based on a lack of majority support is a substitute—a proxy for—a Board election (based on either an RM or an RD petition) where employees have an opportunity to vote to express their desire to remove the union as the bargaining representative. Without regard to the question of the format or method by which employees may provide the employer with objective proof of a lack of majority support, whatever method is used must be sufficient to prove by a preponderance of evidence that a majority of  
 25 employees want to reject union representation, as they would if the matter were put to a vote.

This is what a lack of majority support means—that a majority want the recognized collective-bargaining representative removed as the employees' bargaining representative. This is more than an employee who individually wants nothing to do with the Union, while failing to objectively provide the employer with evidence that he or she wants the Union removed as the  
 30 unit employees' bargaining representative. This is more than frustration or anger at the union, or feelings that the union is not doing the job that the employees want it to do. To permit an employer to unilaterally withdraw recognition on such a showing would be to allow the reintroduction of withdrawal of recognition based on a good-faith doubt standard that was rejected in *Levitz*.

35 Citing, *Wurtland Nursing & Rehabilitation Center*, 351 NLRB 817, 817–819 (2007), the Respondent points out that *Levitz* does not require that the evidence proving loss of majority support be "unambiguous." But the evidence must, at least ambiguously, and then by a preponderance of the evidence, prove that the Respondent knew from objective evidence that the  
 40 union lacked majority of support—i.e., that the employees wanted the union removed as the unit employees' bargaining representative.

45 In *Wurtland*, a majority of employees signed a petition saying they wanted "a vote to remove the Union." The Board majority reasoned that this language was ambiguous: it could be read to mean that the employees merely wanted a vote on decertification, or, the Board found that, more reasonably, it could be read that to mean that the employees wanted a vote in order to and so that they could "remove the Union." On this basis, the Board in *Wurtland* found it "more probable than not that the employees rejected union representation." 351 NLRB at 819.

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<sup>19</sup>See, *Allentown Mack Sales*, 316 NLRB 1199, 1206, 1208 (1995), *enfd.* 83 F.3d 1483 (D.C. Cir. 1996), *revd.* 522 U.S. 359 (1998).

By contrast, in the instant case, the credited evidence of what employees told Dunn and Piccerelli cannot be read as stating a desire to not have the Union as the bargaining representative. The credited testimony of Dunn and Piccerelli does not say that, even ambiguously. The *Levitz* standard means that complaints about the Union, even a lot of them, that *never* and under *no reading* evince an intention to reject union representation and a desire to remove the union as representative, cannot cross the threshold set by *Levitz* for an employer to successfully claim it possessed proof of a lack of majority support for the Union.

Here, the *Levitz* standard has not been met. Indeed, one of the four—out of a unit of seven—O'Brien, literally told Piccerelli, in answer to the question of his interest in having a union, that he did not know "how he would vote" if the issue came to a vote. While he did not feel "that he needed to have Union representation . . . he also felt that he didn't want to go against the friends that he had at the station if [union representation] was something that they wanted. And that he would, you know, think about it going forward." Piccerelli characterized this answer as "wishy-washy," and that is fair, because this employee affirmatively expressed that he was undecided as to whether he wanted to reject the Union.

This fails to meet the *Levitz* standard, and without O'Brien, the Respondent's lack-of-majority-support defense fails. But the problem is not just with O'Brien.

Piccerelli's account of his discussion with Smith involved *nothing* that can be held out as objective proof that he did not want to be represented. Unhappy with the Union, yes. But proof that he wanted the union removed as the representative—it is not there. Piccerelli testified that the subject of the conversation was Smith's desire to be "fairly compensated." Piccerelli testified that although he could not remember Smith's exact words, "I can say that he was not pleased with the representation that he was getting from the Union in terms of his compensation." Although Piccerelli could not "recall his exact words," Smith's "message was that he did not feel that the Union was providing him adequate representation towards compensation." According to Piccerelli, Smith said that "he did not feel like he was being fairly represented by the Union." According to Piccerelli, Smith was "not very specific," but just expressed "general displeasure." According to Piccerelli, Smith "[d]idn't feel that he needed them to represent him, felt that, you know, doing his work would merit whatever increases that he deserves." Piccerelli also testified that he had spoken to Smith "two or three other times over the years," specifically recalling once, "probably sometime May of '16 or earlier . . . definitely more than a year" or "almost a year" prior to the June 2017 conversation with Smith, when Smith was in tears and said that "he was looking for more money and that the Union was not doing anything to get him more money.

Nor does Dunn's testimony—at least not the portion of Dunn's testimony that I have credited—prove that Dunn obtained evidence that Smith did not want union representation.<sup>20</sup> Dunn's credited testimony is that in April or May of 2017, Smith relayed to Dunn an argument he had with Shop Steward Gannon over moving staging equipment, in which Smith told Dunn that he (Smith) told Gannon in the middle of an argument that "you don't represent me." Dunn claimed that over the years Smith repeatedly complained about his wages and said that the Union was not helping him.

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<sup>20</sup>As explained, *supra*, for the reasons stated, I do not credit Dunn's mantra-like testimony that employees told him "there is no union," or they "didn't feel that there was a union," or that the employees told him they "do not feel that they're represented by a Union."

Piccerelli testified that Brathwaite told him that “he didn’t feel it was necessary to have representation from the Union.” According to Piccerelli, Brathwaite “reiterated basically what Mr. Smith said and that he did not feel that they were being fairly represented in terms of their compensation and other benefits from the Union.” Dunn testified that Brathwaite “expressed the same sentiment” as Smith after the dust-up with Shop Steward Gannon and further complained to Dunn that the Union has “their own agenda, they never asked me who I wanted for shop steward.”<sup>21</sup>

As to Sousa, Piccerelli asked Dunn to check with Sousa and see what his feelings were on having representation by the Union. According to Piccerelli, Dunn said he would do so and subsequently told Piccerelli that Sousa “was not interested in having representation by the Union.” However, *Levitz* requires proof of lack of majority support. What Piccerelli testified that Dunn told him that Sousa said is not reliable evidence. The issue is not what Dunn told Piccerelli, but what the Respondent can prove it knew from objective evidence. Dunn did not recall Piccerelli asking him to speak to Sousa about how he felt about union representation, or following up with a report on it to Piccerelli, thus further rendering what Piccerelli says Dunn told him, proof of nothing. Moreover, Sousa testified credibly that Dunn never asked him how he felt about the Union (Tr. 185). Thus, Piccerelli’s source for his information on Sousa, Dunn, misled Piccerelli. As to the credited portions of Dunn’s testimony, Dunn testified that “from 2016 on” Sousa “would often say . . . there’s no contract.” That proves nothing.

The foregoing does not demonstrate by the preponderance of the evidence that the Respondent knew based on its discussions with the four employees that they did not want the unit to be represented by the Union. That is not what Piccerelli was told—by his own account—when he interrogated Smith, Brathwaite, and O’Brien. Dunn told Piccerelli that he asked Sousa and Sousa did not want union representation—but the credited evidence suggests that Dunn did not really follow Piccerelli’s instructions and put the question to Sousa. Rather, Dunn just told Piccerelli that he had checked with Sousa and that Sousa did not want the Union. Dunn’s credited testimony consists of random, vague, mostly undated conversations with the four employees, from which he decided from their negative and frustrated comments about the Union, that they rejected union representation. (That Dunn may have formed an opinion over years of lunches with Sousa, and contact with other employees, that they did not want Union representation, cannot stand-in for the claim that in late May/early June 2017, the Respondent had proof that Sousa or the others specifically said they do not want union representation. See, *Port Printing Ad and Specialties*, 344 NLRB 354, 357 (2005) (dated conversations with employees do not prove current lack of majority support at time employer withdrew recognition), *enfd.* 192 Fed. Appx. 290 (5th Cir. 2006)).

Notably, the Respondent withdrew recognition based on its discussions with these four employees who were part of a seven-person unit. If the statements of even one do not qualify as proof that they wanted to reject union representation, the Respondent’s defense fails. I find that

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<sup>21</sup>Brathwaite’s remark to Piccerelli is slightly stronger than Smith’s comments, as it was in response to Piccerelli asking him “if he wanted to continue forward having representation of the Union.” But again, even putting aside for the moment the remarkable context in which an employee is publicly paged to come into the company president’s office to ask him about his union sympathies, Braithwaite’s guarded construction fails to prove that he wanted to reject union representation. He merely and literally said, when quizzed by the top manager of the Employer, that “he didn’t feel it was necessary”—there is much space between that and proof that he wants to remove the union as representative.

the statements of these employees relied upon by the Respondent are inadequate to prove objectively that any one of the four wanted to reject union representation.

I would add that the employees' testimony about what they told Dunn and Piccerelli must be separated from what Dunn and Piccerelli testified that they were told. While the employees' testimony could have corroborative value, it is not independent relevant objective evidence of employees' lack of support for the Union. As referenced above, under *Levitz*, "In analyzing the adequacy of an employer's defense to a withdrawal of recognition allegation, the Board will only examine factors actually 'relied on' by the employer." *RPT Co.*, 334 NLRB 466, 469 (2001), *enfd.* 315 F.3d 951 (8th Cir. 2003), citing *Holiday Inn of Dayton*, 212 NLRB 553, 553 fn. 1 & 556 (1974). "Conduct of which the employer may have been aware, but on which the employer 'did not base' its decision to withdraw recognition from the Union, is of 'no legal significance.'" *Id.*; *In Re Narricot Industries, L.P.*, 353 NLRB 775, 791 (2009) *Highlands Regional Medical Center*, 347 NLRB 1404, 1407 fn. 17 (2006) ("We need not address the sufficiency of the hearing testimony . . . because this evidence as not before the Respondent when it withdrew recognition"), *enfd.* 508 F.3d 28, 32 (D.C. Cir. 2007); *Anderson Lumber Co.*, 360 NLRB at 544; *Pacific Beach Hotel*, 356 NLRB at 1398 fn. 9.

5 Thus, to the extent an employee made statements to the employer tending show lack of support for union representation but neither Dunn nor Piccerelli testified to knowing about it, much less rely upon it, such statements are of no legal significance under *Levitz*.

10 I note that in addition to disregarding this employee testimony to the extent it was not relied upon by Dunn or Piccerelli in credited evidence, I disregard it (at least with regard to Smith and Braithwaite) for a completely different reason: Braithwaite admitted that he, Smith, and Piccerelli met together the morning of their testimony to discuss their testimony. Tr. 221-223.

15 This is a flagrant violation of the sequestration order entered in this case at the commencement of the hearing the day before. I note that the taint is severe, without regard to their intentions. At least in the Respondent's view, the outcome of this case turns on what its employee witnesses and its managers testified that they talked about with each other in conversations where no one else was present in late May or early June 2017. Thus, the violation of the sequestration rule, in which these same employees met with Piccerelli before testifying to discuss their testimony about those very conversations, strikes at the heart of the credibility of the Respondent's case.<sup>22</sup>

25 In sum, the evidence proffered does not constitute proof by a preponderance of evidence that a majority of employees do not want union representation. It proves only that the Respondent solicited and seized upon the employees' negative comments about the Union to

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<sup>22</sup>At the commencement of the hearing I granted counsel for the General Counsel's motion for a sequestration order and identified on the record (Tr. 9) that the rule to be in effect in the hearing was to be the Board's model sequestration rule set forth in *Greyhound Lines*, 319 NLRB 554 (1995). Counsel were instructed to familiarize themselves with the rule and ensure that any witnesses not present at the time the order was entered were informed of their obligations under the rule. Throughout the hearing I reminded witnesses, and thereby reminded counsel, that we were operating under a sequestration rule and that they should not discuss their testimony with any potential witness. See, e.g., Tr. 61, 177, 187, 211. I further note that the Respondent's violation of the sequestration rule was elemental. If a sequestration order means anything, it means that witnesses should not discuss their testimony with each other before all of them have finished testifying.

claim the outcome it wanted. Accordingly, the Respondent's defense to the 8(a)(5) allegations fails.<sup>23</sup>

### CONCLUSIONS OF LAW

- 5
1. The Respondent Rhode Island PBS Foundation is an employer within the meaning of Sections 2(2), (6), and (7) of the Act.
  - 10 2. The Charging Party International Brotherhood of Electrical Workers, Local 1228, AFL-CIO (Union) is the exclusive collective-bargaining representative of the following appropriate unit of the Respondent's employees (the Unit):
 

15 All full-time and regular part-time Maintenance Engineers, Television/  
Broadcast/Watch Engineers and Telecommunications/Television Technicians  
employed by the Employer, but excluding all other employees, guards, and  
supervisors as defined in the Act.
  - 20 3. The Respondent violated Section 8(a)(1) of the Act, in or around late May 2017, by coercively interrogating employee Mark Smith about the union sympathies of his co-employees.
  4. The Respondent violated Section 8(a) (1) of the Act, in or around late May 2017, by coercively interrogating employee Joseph Braithwaite about his union sympathies.
  - 25 5. The Respondent violated Section 8(a)(1) of the Act, in or around late May or early June 2017, by interrogating employee Patrick O'Brien about his union sympathies.
  6. The Respondent violated Section 8(a)(5) and (1) of the Act by, beginning on or about May 11, 2017, failing and refusing to meet with the Union for the purposes of negotiating a collective-bargaining agreement for the employees of the Unit.
  - 30 7. The Respondent violated Section 8(a)(5) and (1) of the Act, on or about October 19, 2017, by unilaterally withdrawing recognition from the Union as the exclusive collective-bargaining representative of the employees of the Unit.
  - 35 8. The Respondent violated Section 8(a)(5) and (1) of the Act, on or about October 31, 2017, by failing and refusing to furnish the Union with requested and relevant information necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of the employees of the Unit.
  - 40 9. The Respondent violated Section 8(a)(5) and (1) of the Act, on or about December 31, 2017, by unilaterally granting a wage increase to unit employees Nick Moraites and Mark Smith without providing the Union with notice and an opportunity to bargain over the wage increase.
  - 45 10. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

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<sup>23</sup>I do not reach a final issue raised by the General Counsel (GC Br. at 17-18)—i.e., that even assuming, arguendo, the Respondent had evidence of lack of majority support for the Union in May/June 2017, such dated evidence could not be a basis for an October 19, 2017 withdrawal of recognition, nearly five months later. Given my findings that the evidence on which the Respondent based its withdrawal of recognition was invalid for multiple independent reasons, I need not and decline to reach this final issue.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

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The Respondent having violated Section 8(a)(5) and (1) of the Act by failing and refusing to meet with the Union for the purposes of negotiating a collective-bargaining agreement, and by withdrawing recognition from the Union as the collective-bargaining representative of the unit employees, shall be ordered recognize the Union and, upon request, bargain for a reasonable period of time (as set forth in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), *enfd.* 310 F.3d 209 (D.C. Cir. 2002)) with the Union as the bargaining representative of the unit employees with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed document.

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The Board has previously held that an affirmative bargaining order is “the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees.” *Caterair International*, 322 NLRB 64, 68 (1996). For the reasons set forth in *Caterair*, and applying this Board precedent, an affirmative bargaining order is warranted as a remedy here.

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While the Board applies *Caterair*, in several cases, the U.S. Court of Appeals for the District of Columbia Circuit has required the Board to justify on the facts of each case the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 738–739 (D.C. Cir. 2000); *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In view of this, the Board analyzes the facts in accordance with the D. C. Circuit cases which, as summarized by the Court in *Vincent*, *supra* at 738, require that an affirmative bargaining order “must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees’ § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.”

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Adhering to the Board's approach, and analyzing the facts of this case under the three-factor balancing test outlined by the D.C. Circuit, I find that the facts warrant an affirmative bargaining order here.

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(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining through their designated representative by the Respondent's refusal to meet to bargain from and then by the Respondent's withdrawal of recognition. As discussed above, the Respondent's refusal to recognize and bargain with the Union occurred at a time when the Union was repeatedly requesting bargaining, during a time when the employer was providing unilateral wage increases to employees, but also during a time when there was no employee effort to decertify the Union.

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(2) At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued representation by the Union because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. Since the Union was unfairly deprived of an opportunity to reach an agreement with the Respondent, it is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that the employees will be

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able to fairly assess the Union's effectiveness as a bargaining representative in an atmosphere free of the Respondent's unlawful conduct. The employees can then determine whether continued representation by the Union is in their best interest. This is particularly important here, as the record demonstrates that the Respondent exploited employees' frustrations with the Union, which, in part, resulted from the Respondent's refusal to collectively bargain for higher wages, to justify its unlawful conduct.

(3) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. It removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured by the possibility of a decertification petition or by the prospect of an imminent withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and the issuance of a cease-and-desist order.

(4) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent's withdrawal of recognition and refusal to bargain with the Union because it would permit another challenge to the Union's majority status before the taint of the Respondent's previous unlawful withdrawal of recognition has dissipated. Such a result would be particularly unfair in circumstances such as those here, where the Respondent's unfair labor practices precluded effective bargaining representation and rendered it difficult if not impossible for the Union to win back employee support that it had lost. Allowing another challenge to the Union's majority status without a reasonable period for bargaining would be unjust given that the Respondent's withdrawal of recognition would likely have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. In these circumstances, permitting a decertification petition to be filed immediately might very well allow the Respondent to profit from its own unlawful conduct. I find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, I find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case.

The Respondent, having unlawfully failed and refused to furnish the Union with requested and relevant information, shall provide the Union with the information requested in its October 31, 2017 information request.

The Respondent, having violated Section 8(a)(5) and (1) of the Act by unilaterally granting employee wage increases shall be ordered, upon the Union's request, to rescind these unilateral changes and restore the status quo ante.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted at the Respondent's facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 11, 2017. When the notice is issued to the Respondent, it

shall sign it or otherwise notify Region 1 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>24</sup>

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**ORDER**

The Respondent Rhode Island PBS Foundation, Providence, Rhode Island, its officers, agents, successors, and assigns, shall

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1. Cease and desist from:

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(a) Coercively interrogating employees about their union sympathies or the union sympathies of other employees, including whether they want the International Brotherhood of Electrical Workers, Local 1228 (Union) to continue as their collective-bargaining representative.

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(b) Refusing to bargain collectively with the Union by failing and refusing to meet with the Union to negotiate a collective-bargaining agreement for the following appropriate unit:

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All full-time and regular part-time Maintenance Engineers, Television/Broadcast/Watch Engineers and Telecommunications/Television Technicians employed by the Employer, but excluding all other employees, guards, and supervisors as defined in the Act.

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(c) Refusing to bargain collectively with the Union by withdrawing recognition from the Union and failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit employees.

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(d) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondents' unit employees.

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(e) Refusing to bargain collectively with the Union by unilaterally granting wage increases to employees without first notifying the Union and giving it an opportunity to bargain.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request of the Union, bargain with the Union for a reasonable period as set forth in the remedy portion of the foregoing decision as the exclusive collective-

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<sup>24</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

bargaining representative of the employees in the above-described unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

- 5 (b) Furnish to the Union in a timely manner the information requested on or about October 31, 2017.
- 10 (c) Upon request of the Union, rescind the unilateral wage increases granted to unit employees Nick Moraites and Mark Smith on or about December 31, 2017.
- 15 (d) Within 14 days after service by the Region, post at its facility in Providence, Rhode Island, copies of the attached notice marked "Appendix."<sup>25</sup> Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices in each language deemed appropriate shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice in each appropriate language, to all current employees and former employees employed by the Respondent at any time since May 11, 2017.
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- 30 (e) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply

Dated, Washington, D.C. July 23, 2018

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David I. Goldman  
U.S. Administrative Law Judge

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<sup>25</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your union sympathies or about other employees' union sympathies, including whether you want the International Brotherhood of Electrical Workers, Local 1228 (Union) to continue as your collective-bargaining representative.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to negotiate a collective-bargaining agreement for the following appropriate unit of employees:

All full-time and regular part-time Maintenance Engineers, Television/  
Broadcast/Watch Engineers and Telecommunications/Television Technicians  
employed by the Employer, but excluding all other employees, guards, and  
supervisors as defined in the Act.

WE WILL NOT refuse to bargain collectively with the Union by withdrawing recognition from the Union and failing and refusing to recognize and bargain with the Union as the collective-bargaining representative of our unit employees.

WE WILL NOT refuse to collectively bargain with the Union by failing and refusing to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT refuse to bargain collectively with the Union by unilaterally granting wage increases to employees without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, upon request of the Union, bargain with the Union as the collective-bargaining representative of our unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL furnish the Union with the information requested by it on or about October 31, 2017.

WE WILL, upon request of the Union, rescind the unilateral wage increases granted to employees Nick Moraites and Mark Smith on or about December 31, 2017.

RHODE ISLAND PBS FOUNDATION

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

10 Causeway Street, 6th Floor, Boston, MA 02222-1072  
(617) 565-6700, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/01-CA-204520](http://www.nlr.gov/case/01-CA-204520) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (617) 565-6700.